

Internal Revenue Service  
**memorandum**

CC:FS

PRO:JTChalhoub

TL-N-756-92

date:

**DEC 10 1991**

to:

District Counsel, [REDACTED]

from:

Assistant Chief Counsel (Field Service)

subject:

[REDACTED] - Nondocketed -- Validity of Consents

This is in response to your October 21, 1991 memorandum requesting advice on the validity of certain consents executed by [REDACTED].

ISSUE

Whether the Service may rely upon the efficacy of Form 872 consents executed by a [REDACTED] who has been ruled by the trial court to be incapable of assisting or defending himself against the [REDACTED].

CONCLUSION

The Service may, and should, rely upon the signature of [REDACTED] who signed consents for [REDACTED] and [REDACTED] through [REDACTED]. The taxpayers have indicated that they have no intention of initiating any proceeding in the state or local courts to have a committee appointed to handle [REDACTED]'s business and personal affairs for which [REDACTED] has continued to sign documents. His attorney has represented, in writing, to induce reliance by the Service that "It is our position that [REDACTED] is competent to execute consents." We conclude, that [REDACTED] would be equitably estopped from raising the defense of the bar of the statute of limitations on assessments because his acts and the acts of his agent (attorney) have induced the Commissioner not to issue a notice of deficiency prior to [REDACTED], the expiration date for the prior consents.

FACTS

In [REDACTED], a federal grand jury returned a [REDACTED] count indictment against [REDACTED], [REDACTED] and [REDACTED] other persons. The indictment charged the defendants with conspiracy to defraud the United States [REDACTED]

[REDACTED]. In [REDACTED], defendant [REDACTED] filed a motion for continuance of his trial on the ground that his

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medical condition rendered him unable to assist properly in his own defense.

[redacted] was examined by [redacted] doctors, [redacted] the [redacted] medical community. All of the experts concluded that [redacted] suffers from [redacted]. On [redacted], shortly before a scheduled trial of the criminal charges, the trial court held a hearing on the motion. By order dated [redacted], the trial court granted [redacted]'s motion for indefinite continuance of his trial on the criminal charges.

On [redacted], the Service countersigned several restricted consents that extended the statute of limitations on assessment for the years [redacted] and [redacted] through [redacted] to [redacted]. These consents were executed and accepted by the Service prior to a ruling by the trial court that [redacted] could not assist in his defense of criminal charges, but after the [redacted] hearing on the motion.

We understand that contrary to the advice of counsel, pending resolution of the legal question whether new consents would be binding, the Service countersigned on [redacted] a restricted consent for [redacted] and [redacted] for the [redacted] taxable year extending the period of limitations to [redacted]. Similarly, on [redacted], the Service countersigned a consent for [redacted] and [redacted]'s taxable years [redacted] through [redacted] to expire [redacted]. A third consent was countersigned by the Service on [redacted] extending [redacted] and [redacted]'s [redacted] and [redacted] taxable years to [redacted].

## DISCUSSION

### Taxpayer's Position

District Counsel has been advised by opposing counsel that there has been no state court proceeding to determine whether [redacted] is incompetent to handle his business and personal affairs. Thus, no committee has been appointed nor has any proceeding been initiated, nor is one contemplated, to have [redacted] ruled incompetent. District Counsel has been informed that [redacted] at present and at all times previously, has conducted his own business and personal affairs, including entering contracts,

mortgages and other business agreements. The taxpayers and their counsel intend for [REDACTED] to continue to do so. A letter from [REDACTED]'s attorney referencing the recent consents states "it is our position that [REDACTED] is competent to execute the Consents."

On [REDACTED], prior to any criminal charges, [REDACTED] signed a "Durable General Power of Attorney" giving [REDACTED] the power to act in his behalf. The power includes a provision to handle tax matters and includes, among other powers, the power "to execute consents extending the statutory period for assessment and collection of taxes." We did not include the fact of the durable power in our recitation of material facts because the information with respect thereto is incomplete. There is some question whether the laws of the State of [REDACTED] or the State of [REDACTED] should apply, since we are not informed as to [REDACTED] and [REDACTED]'s domicile or residence. We have no knowledge concerning whether the power, 18 pages long, was recorded in [REDACTED] State, although the signature page furnished us indicates it is to be interpreted "in accordance with the laws of the State of [REDACTED]."

The taxpayers' counsel has offered to have [REDACTED] sign new consents on behalf of [REDACTED] if the Service refuses to accept his signature to the consents in the Service's possession. Our prior concern as to which State's law should apply to durable powers, is no longer important, since both states have very similar statutory provisions, [REDACTED]

[REDACTED]

[REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. We have concluded that on the specific facts of this case, we need not look to Leona to execute new consents [REDACTED].

Prior Tax Court Case Law

District Counsel cites Hollman v. Commissioner, 38 T.C. 251 (1962) as supporting the view that consents signed by a taxpayer, who is purported to be mentally incompetent, were valid

extensions of the statute of limitations on assessment. The facts in Hollman are similar to the facts herein and are only distinguishable by reason of the execution of the consents prior to the ruling of incompetency to stand trial on criminal charges. Arguably, Hollman could be said to apply to the earlier consents signed by [REDACTED] and countersigned by the IRS on [REDACTED]. In Hollman, the Tax Court stated, in relevant part, as follows:

[P]etitioner contends that the consents signed in 1957, 1958, and 1959, although regular upon their face, are invalid because of his mental incompetency during the years in which the consents were executed. He concedes that he has the burden of proving their invalidity.

\* \* \* \* \*

[T]he reasonable reliance by the Government upon these waivers, which were in all respects regular in form, should preclude any successful attack upon their validity, whether the situation be one calling for the application of estoppel or some cognate doctrine.

An earlier case, although not having the precedential value of Hollman, in our view, is more in line with the facts of this case. See Kronstadt v. Commissioner, T.C. Memo. 1954-32. In that case respondent determined deficiencies and fraud penalties for 1943 through 1948. The deficiencies for tax years 1943 through 1945 were payable if the respondent established fraud. For 1946 and 1947, the taxpayer had executed consents in March of 1950 and May of 1951 with respect to 1946 and in March of 1951 with respect to 1947. The notice of deficiency was issued August 15, 1951. In the latter part of 1945, petitioner was assaulted, robbed and badly beaten. His health and memory deteriorated after the beating. Petitioner's brother helped him with his business transactions and on March 5, 1949, in a written and later recorded instrument, petitioner "made, constituted and appointed" his brother as his true and lawful attorney. The Tax Court concluded that the Commissioner failed to prove fraud for any of the tax years in issue and the deficiencies were barred for 1943, 1944 and 1945. The Tax Court went on to state:

As to the years 1946 and 1947, respondent contends the period for assessment and collection has been extended by waiver. There is no question concerning the fact that waivers were executed by petitioner and respondent for the years 1946 and 1947, but the petitioner's counsel argues that petitioner's knowledge and memory did not permit him to understand the nature of the papers he signed. Petitioner did not appear at the hearing, nor did the revenue agents question him at any time during their investigation prior to the hearing. The agents refrained from questioning petitioner because they were advised that an investigation would have an injurious effect on his health. There was

testimony that petitioner was not in good health, that his memory was bad, and that he would have difficulty in understanding the tax problems presented in this proceeding. A physician's affidavit to this effect, dated November 23, 1953, was also introduced into evidence, but the doctor did not testify. The evidence evincing petitioner's incompetence and lack of understanding does not stand uncontroverted. First, during the years of petitioner's alleged memory failure, that is, from 1945 on, he still bought and sold real property. In 1949 he was competent enough to give his brother a power of attorney. Finally, there was no showing that it was necessary to entrust petitioner's interests to a committee. Considering the evidence and arguments of both parties, we believe it is not shown that petitioner was incompetent or that he did not know what he was doing when he signed the waivers. Therefore, the years 1946 and 1947 are not barred by the period of limitations upon assessment and collection, and respondent is sustained for these years.

We are informed that even after petitioner [REDACTED] suffered a series of [REDACTED] that resulted in the diagnosis of "[REDACTED]", [REDACTED] continued to handle personal and financial affairs, including entering contracts, mortgages and other business agreements involving the purchase and sale of real property. In this respect, [REDACTED] is very similar to Aaron D. Krondstadt, who continued to buy and sell real estate as part of his business and personal affairs.

#### Equitable Estoppel

The defense of equitable estoppel is available to respondent if we accept the current waivers with [REDACTED]'s signature. In order for the defense to apply the following circumstances must exist:

(1) there must be a false representation or wrongful misleading silence; (2) the error must originate in a statement of fact, not in opinion or a statement of law, (3) the one claiming the benefits of estoppel must not know the true facts; and (4) that same person must be adversely affected by the acts or statement of the one against whom the estoppel is claimed.

Lignos v. United States, 439 F.2d 1365, 1368 (2d Cir. 1971); Piarulle v. Commissioner, 80 T.C. 1035, 1044 (1983); Stair v. United States 516 F.2d 560 (2d Cir. 1975). Fundamental to the doctrine of equitable estoppel is the premise that the party raising the doctrine must have been misled by the representations of his party opponent and must have relied upon those


misrepresentations. We believe legal arguments could be fashioned to prevent [REDACTED] from later challenging the competence of his signature. We would have preferred to insert specific language to indicate our acceptance of the consents was conditioned on the representation by [REDACTED] (and by his counsel in writing) that he was competent to sign the consents. In consideration of not issuing a notice of deficiency before [REDACTED], the Commissioner is relying to his detriment, on the representations that [REDACTED] is competent. Since the documents have been signed without specific language to condition Service acceptance, we continue to have some risk, although we believe it to be de minimis.

This document may include confidential information subject to the attorney-client and deliberative process privileges and may also have been prepared in anticipation of litigation. This document should not be disclosed to anyone outside the IRS, including the taxpayer(s) involved, and its use within the IRS should be limited to those with a need to review the document in relation to the subject matter or case discussed herein. This document also is tax information of the instant taxpayer which is subject to I.R.C. § 6103.

If you have any questions concerning this memorandum please contact Joseph T. Chalhoub at FTS 566-3520.

DANIEL J. WILES

By:

  
SARA M. COE  
Chief, Procedural Branch  
Field Service